

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-453 (RGA)
)	
ACTIVISION BLIZZARD, INC.)	REDACTED
)	PUBLIC VERSION
Defendant.)	

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-454 (RGA)
)	
ELECTRONIC ARTS INC.,)	REDACTED
)	PUBLIC VERSION
Defendant.)	

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-455 (RGA)
)	
TAKE-TWO INTERACTIVE SOFTWARE,)	REDACTED
INC., ROCKSTAR GAMES, INC. and)	PUBLIC VERSION
2K SPORTS, INC.,)	
)	
Defendants.)	

DEFENDANTS’ REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE ACCELERATION BAY’S UNTIMELY DISCLOSED PROPOSED CLAIM CONSTRUCTIONS

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Plaintiff's opposition brief argues that its conduct was proper and routine, and that it was Defendants' identification of "too many terms" that led to Plaintiff's refusal to meet and confer or exchange its positions. But the record shows that Plaintiff's failure to participate in the Court-Ordered claim construction process prevented the parties from identifying, much less resolving disputes. Plaintiff's position that all terms carry their "plain and ordinary meaning" is clearly belied by its reliance on more than 50 pages of expert testimony to explain "plain and ordinary meaning." But no expert testimony would have been necessary if what Plaintiff were actually relying on was plain and ordinary meaning.

Plaintiff's conduct was tactical and prejudiced not only the Defendants, but also this Court. Since at least the Federal Circuit's decisions *O2 Micro* and *Eon*, all patent litigants have understood active claim construction disputes must be resolved by the Court before trial. To aid in this task, this Court, like most courts, sets a schedule for claim construction which orders the parties to disclose their positions so that the Court can resolve claim construction disputes on the timeline provided by the Scheduling Order. Since at least *Phillips*, the principal dispute about claim construction is over what *is* the "plain and ordinary" meaning of the claim term in light of the specification. *Phillips* does not give any party the right to withhold its positions under the guise of plain and ordinary meaning. Indeed, Plaintiff's position would eviscerate the letter and spirit of the Court's standard claim construction Order.

Plaintiff's conduct was intended to and has been an end run around that Court-ordered process. Plaintiff argues that it did not actually propose constructions in the expert report, and therefore complied with the Scheduling Order. This argument is plainly incorrect, but also misses the point. Until the actual briefing process, Plaintiff concealed its claim construction positions and also concealed the fact that it was actively disputing every claim term and basing its case on re-

written claims. Indeed, Plaintiff's Opening Claim Construction Brief and its supporting expert declaration show that Plaintiff uses the guise of "plain and ordinary meaning" to interpret the claims in a manner that would eviscerate all meaningful limitations, and especially the very limitations the Applicants added to overcome prior art rejections. Plaintiff now says under its view of "plain and ordinary meaning," that "m" can change at any time, selective network participants can be ignored to determine if the network is "m-regular," "m-regular" can occur coincidentally and ephemerally, and the network need not be both m-regular and incomplete. A review of the chart of Plaintiff's belatedly disclosed positions shows that they are all claim constructions that should have been disclosed. Plaintiff has no explanation for why it failed to timely and properly disclose all of these claim construction positions. Indeed, showing no remorse at all, Plaintiff's Reply Brief proposed *yet another undisclosed construction*, this time for the key term, "computer readable medium," for which its expert offers a lengthy construction that adds new limitations under the guise of plain and ordinary meaning. Plaintiff's conduct in proposing even more constructions through its Reply Brief further confirms that sanctions are appropriate.

I. Plaintiff Changed Its Positions And Offered Constructions, Not Just Plain And Ordinary Meaning, For The Forty-Six Terms.

Although Plaintiff vehemently argues that it did not change its position for the forty-six terms, the record completely belies Plaintiff's argument. There is no question that the parties have extensively disputed the meaning and scope of the claims from the very beginning as reflected in the numerous motions to compel infringement contentions, for sanctions based on violations of Rule 11, and for dismissal based on lack of patentable subject matter. As a result, Plaintiff knew the parties disagreed about the meaning of critical claim terms and that those terms had to be construed. By claiming "plain and ordinary meaning" for *all* of those terms and maintaining that position in all of the required disclosures, Plaintiff withdrew the right to argue about the meanings

of those terms and its brief and expert declaration should be stricken.

The Federal Circuit has explained that “[w]hen the parties raise an actual dispute regarding the proper scope of these claims, the court, not the jury, must resolve that dispute.” *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008). A party’s failure to properly participate in the claim construction process can constitute bad faith. *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1325 (Fed. Cir. 2011). “[T]he ‘simultaneous’ submission requirement applied to claims construction briefing schedules is not without purpose. It is intended, in part, to have the parties submit their respective positions on disputed terms without the luxury of the opposing parties’ papers.” *Shire LLC v. Amneal Pharm., LLC*, 2013 WL 1932927, at *12 (D.N.J. May 7, 2013). Here, there is no doubt that Plaintiff ignored and disregarded these fundamental principles.

As an initial matter, Plaintiff knew long before Defendant submitted its list of terms for construction that there were issues concerning the plain and ordinary meaning for terms in the patents. Indeed, Defendants would have had no purpose in proposing these terms for construction if the parties agreed on the plain and ordinary meaning, as that is the default construction for every term. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005). In only offering plain and ordinary meaning, Plaintiff’s purpose was to have a strategic advantage of considering and reacting to Defendants’ constructions without providing Plaintiff’s constructions. Such gamesmanship is contrary to the claim construction process and results in Courts striking submissions that would allow one party to benefit from such behavior. *See Shire LLC*, 2013 WL 1932927, at *12; *see also* Ex. A (contemplating not only striking untimely disclosed proposed claim constructions but also revoking *pro hac vice* status of attorneys involved).

Plaintiff’s claim construction briefing and expert declaration shows that Plaintiff was acting

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